

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2006-050089

10/23/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA STATE DEPARTMENT OF
REVENUE

MIRAL A SIGURANI

v.

MEDICAL BILLING SERVICES OF ARIZONA
INC, et al.

IVAN K MATHEW

UNDER ADVISEMENT RULING

Defendant's Motion for New Trial has been under advisement.

Medical Billing Services of Arizona, Inc. failed to pay withholding taxes for the tax years 2000 and 2001 in the amount of \$17,414.08. Defendant Christopher Asterino was, from some point prior to that date, president of the corporation; at no time before the filing of this action was the Department of Revenue or the Corporation Commission informed that he had ceased to be president. The State therefore alleges that he is a person required to collect, truthfully account for and pay over the tax pursuant to A.R.S. § 43-435. The State moved for summary judgment against Defendant Asterino. In response, Defendant submitted only an unsworn statement, failing to satisfy the requirements of either Rule 56(c)(1) or Rule 80(i), asserting that other officers and directors of the corporation rather than he were responsible for the payment of taxes under the statute. Apart from citing the results of an Internal Revenue Service investigation into unpaid federal taxes, he offered no further evidence against the State's motion. Finding that Defendant had established no genuine issue of material fact, the Court in its Minute Entry of July 17, 2006 granted the State's Motion for Summary Judgment. Defendant has now filed a Motion for New Trial and Other Relief Pursuant to Rule 59.

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Defendant's Motion contains much that was not brought before the Court in its Objection to Motion for Summary Judgment:

1. Defendant's original declaration, even if it were admissible as an affidavit, states only that he was not President continuously during 2000 and 2001, offers no time frame for his periods of service and non-service, and makes no mention of his purported resignation in June 2000;
2. No resignation letter or voice mail was submitted as an exhibit or even referred to;
3. No assertion was made that the Corporation Commission records relied upon by the State were inaccurate or unreliable, and no evidentiary objection was raised against their use (while the summary page from the Corporation Commission website was introduced for the first time in the Reply, copies of Medical Billing's filings with the Commission, identifying Defendant Asterino as president, were included in the Statement of Facts accompanying the original Motion);
4. No evidentiary objection was made against the State's affidavit of Christie Coll;
5. Marion Drake is never mentioned (the Court is still not clear on just who she is or how the discussion of Medical Billing's payroll taxes came about), nor is it ever suggested that Mr. Church affirmed that Defendant Asterino was not a responsible party;
6. Neither in the Objection nor at any other time until this Motion did Defendant complain that the State failed to comply with Rule 26.1.

The Court denied Defendant's Rule 56(f) Motion, as it was unconvinced that the depositions sought would result in the discovery of material evidence. *Alberta Securities Commission v. Ryckman*, 200 Ariz. 540, 543 ¶ 11 (App. 2001). That this conclusion was correct is supported by the affidavit of Richard Caramanica, one of those for which Defendant sought delay, which is attached as Exhibit 4 to Defendant's Motion for New Trial. That affidavit does not address the key question of whether Defendant Asterino had responsibility under the statute for paying over the taxes. If he did, *even if his superiors expressly ordered him not to pay, it was his legal duty to disobey that order and pay the taxes*. None of the other evidence Defendant proffers would have been unavailable to Defendant at the time the State's Motion was briefed, and none of it was addressed in the Rule 56(f) Motion. It is within the Court's discretion not to consider evidence dilatorily brought in the context of a motion for a new trial, after the granting of a motion for summary judgment. *Mast v. Standard Oil Co. of California*, 140 Ariz. 1, 6 (1984). The Court therefore declines to consider it.

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Turning then to Defendant's specific grounds for seeking a new trial:

1. **Irregularity in the proceedings of the Court.** Defendant did not object to the copies of Corporation Commission filings or to absence of Rule 26.1 disclosure statements.
2. **Any order or abuse of discretion whereby the moving party was deprived of a fair trial.** Again, Defendant did not object to allegedly inadmissible evidence. Defendant did not provide evidence, beyond an inadmissible unsworn and self-serving statement, as to the period of his service as president. The Court adhered to the standards set forth in *Orme School v. Reeves*, 166 Ariz. 301 (1990), but found no genuine issue of material fact as reflected in the record existing at that time.
3. **Misconduct of the prevailing party through any action or surprise which could have been prevented through ordinary prudence.** Defendants conflate Rule 59(a)(2) and (3). Defendant presented no evidence in his Objection that the State had any relevant information concerning Mr. Carr-Locke or Mr. Caramanica. As this Court previously ruled, the IRS determination is of no consequence, as the federal and state laws relating to liability for withholding taxes are materially different.
4. **Excessive or insufficient damages.** Presumably Defendant complains of excessive damages. Again, Defendant presented no evidence as to his tenure as president. The State sufficiently established the sum of \$17,414.08 as damages.
5. **Error in the admission or rejection of evidence or other errors of law occurring at the trial or during the progress of the action.** Evidentiary objections not made at the time are waived. Ariz.R.Evid. 103(a)(1); *State v. Gillies*, 135 Ariz. 500, 511 (1983). The Court followed the mandate of *Orme School v. Reeves*, *supra*, in its determination that no genuine issue of material fact existed.
6. **The verdict is a result of passion or prejudice.** It is not improper for the State to seek, or the Court to award, payment of taxes authorized by law.
7. **The verdict, decision, findings of fact or judgment is not justified by the evidence or is contrary to law.** To repeat, Defendant presented no evidence as to his tenure as president. Nor did he present evidence that he was not in a position to pay over the taxes, as opposed to merely being given an unlawful order by other officers of directors whose instructions he was legally obligated to disregard.

The Court has left out one of the Rule 59(a) factors: newly discovered evidence. Evidence in the possession of the party seeking relief cannot be considered newly discovered evidence for Rule 59 purposes. *Wendling v. Southwest Savings & Loan Ass'n*, 143 Ariz. 599, 602 (App. 1984). It follows that such evidence cannot be used to corroborate a self-serving affidavit as required by *Florez v. Sargeant*, 185 Ariz. 521, 526 (1996). Little discovery has been conducted and the case is in its early stages. Out of an abundance of caution, the Court will allow this case to proceed, but only on the issue that Mr. Asterino had resigned as president of Medical

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Billing Services and that he no longer had the responsibility and the ability to pay over the taxes owed by that corporation.

Therefore, IT IS ORDERED granting Defendant's Motion for New Trial in accordance with this minute entry ruling.